occurred. Under "Track B," a BOC can hide behind paper claims of "competitive checklist" compliance.

If a BOC can remedy any deficiency in its "Track A" showing simply by reference to a SGATC, then full implementation of the "competitive checklist" is not in fact required and a fundamental inconsistency arises. It is a well established tenet of statutory construction that statutes should be given the most harmonious, comprehensive meaning possible in light of the legislative purpose.[52] If statutory provisions can be read in conformity with one another, they should be so reconciled and not interpreted to create conflicts or inconsistencies.[53]

Sections 271(c)(1)(A) and 271(c)(1)(B) can be read in harmony if "Track B" is treated as the narrowly-crafted exception it was intended to be. Under this approach, further reliance upon "Track B" is foreclosed once "Track A" is activated. "Track B" thereafter cannot be used either exclusively or on a "fill-in-the-gaps" basis. As such, a BOC will be required to show that it is providing network access and interconnection and that the 14-point "competitive checklist" has been fully implemented in order to qualify for "in-region," interLATA service authority. Only in those rare situations in which it cannot demonstrate actual provision of network access and interconnection and full implementation of all "competitive checklist" items because no prospective competitor has sought to interconnect network facilities will a BOC be allowed to rely upon the simple inclusion of "competitive checklist" items in a SGATC.

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[52] *See, e.g.,* Weinburger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 at 631; Bailey v. United States, 511 F.2d 540, 545 (Ct. Cl. 1975).

[53] *See, e.g.,* Montgomery Charter Service, Inc. v. Washington Metropolitan Area Transit Commission, 325 F.2d 230, 235 (D.C.Cir. 1963); Maiatico v. United States, 302 F.2d 880, 886 (D.C.Cir. 1962); Bailey v. United States, 511 F.2d 540 at 545.

Inconsistencies arise only when efforts are made to blend "Track A" and "Track B." If the two tracks are treated as separate and distinct entry vehicles, no conflicts arise.

TRA does agree with Ameritech Michigan, however, that a BOC may use multiple network interconnection/access agreements to satisfy the "competitive checklist" if the individual provisions of those multiple agreements are made individually available to all competitive LECs through "most favored nation" provisions. TRA parts company with Ameritech Michigan with regard to the mandatory provision of such "checklist" items. TRA submits that a BOC that relies upon multiple network interconnection/access agreements to achieve "competitive checklist" compliance, must actually be providing all fourteen "checklist" items to one or more competitive LEC.

Section 252(i) requires incumbent LECs to make available "any interconnection, service or network element provided under an agreement approved under . . . [Section 252] to which it is a party to any requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[54] The Commission has read Section 252(i) to "support[] requesting carriers' ability to chose among individual provisions contained in publicly filed interconnection agreements," and to entitle any requesting carrier to "avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission."[55] Because Ameritech Michigan has voluntarily opted to provide complete "mix and match" opportunities to all competitive LECs, it should be permitted

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[54] 47 U.S.C. § 252(i).

[55] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶¶ 1310, 1316.

to rely upon multiple agreements to demonstrate "competitive checklist" compliance. Through "most favored nation" provisions, all new market entrants should be able to secure all fourteen "competitive checklist" items even if individual elements are not included in their respective agreements.

If, however, competitive LECs are not in practice permitted to readily "avail [themselves] . . . of more advantageous terms and conditions subsequently negotiated by any other carrier" despite the inclusion of "most favored nation" provisions in their network interconnection/access agreements, Ameritech should not be permitted to rely upon multiple agreements to demonstrate "competitive checklist" compliance. The record in MSPC Case No. U-11104 suggests that Ameritech may be erecting obstacles to the effective use of "most favored nation" provisions, creating delay and uncertainty regarding the general availability of terms and conditions included in any given agreement.[56] Ameritech should only be allowed the benefit of "mixing and matching" agreements for "competitive checklist" compliance purposes if it is actually allowing competitive LECs the benefit of "mixing and matching" for operational purposes.

Moreover, "mix and match" opportunities cannot substitute for the actual provision of all "competitive checklist" items. TRA does not agree with Ameritech Michigan that a BOC can be deemed to be "providing" a "checklist" item even though no competitive LEC is actually using the item. Congress made clear that "providing" a service or facility is very different from merely "offering" such a service or facility, allowing for the latter in "Track B," but requiring

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[56] TCG Detroit's Submittal of Supplemental Information Regarding Ameritech's Breach of Interconnection Agreement, submitted to the Michigan Public Service Commission in Case No. U-111104 on May 8, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-006620 - 32).

the former in "Track A."[57] While "providing" can be used in standard parlance to mean "make available," the context in which it is used in Section 271(c) precludes such a reading. "Providing" under "Track A" means actually furnishing. This reading is confirmed not only by the Congress' use of the present tense -- *i.e.,* "is providing" -- in Sections 271(c)(1)(A) and (c)(2)(A), but the Conference Committee's declaration that:

> The requirement that the BOC "is providing access and interconnection" means that the competitor has implemented the agreement and the competitor is operational."[58]

Certainly, the conduct of a test, a trial or a demonstration does not render a "competitive checklist" item "fully implemented" or a competitor fully "operational." Such activities are undertaken as precursors to commercial operation in order to identify and remedy problems and to ensure that services and facilities are fully functional. Likewise, a competitor should not be deemed to be "operational" until the network access/interconnection agreement under which it will operate has been fully implemented. Piecemeal or partial implementation of an agreement does not allow for viable commercial operation. Finally, constraints on capacity or other limitations which impact service quality preclude full commercial operation and thus, if present, preclude a finding that the BOC has satisfied the requirement that it must be providing access and interconnection to its network facilities and have fully implemented the 14-point "competitive checklist."

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[57] *Compare* 47 U.S.C. § 271(c)(1)(A) *with* 47 U.S.C. § 271(c)(1))(B) and 47 U.S.C. § 271(c)(2)(A)(i)(I) *with* 47 U.S.C. § 271(c)(2)(A)(i)(I)

[58] Joint Explanatory Statement at 148.

1. Ameritech Michigan's Operations Support Systems are Not Fully Tested and Operational

The Commission has repeatedly emphasized the critical importance of operations support systems ("OSS") to the ability of new market entrants to compete with incumbent LECs using unbundled network elements or resold services:

> [T]he massive operations support systems employed by incumbent LECs, and the information such systems maintain and update to administer telecommunications networks and services, represent a significant barrier to entry. It is these systems that determine, in large part, the speed and efficiency with which incumbent LECs can market, order provision and maintain telecommunications services and facilities. Thus, we agree with Ameritech that "[o]perational interfaces are essential to promote viable competitive entry."[59]

The Commission has been no less adamant with respect to the obligation of incumbent LECs to provide nondiscriminatory access to OSS functionalities:

> We conclude that an incumbent LEC must provide nondiscriminatory access to [its] operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing available to the LEC itself. Such nondiscriminatory access necessarily includes access to the functionality of any internal gateway systems the incumbent LEC employs in performing the above functions for its own customers. . . . Obviously, an incumbent that provisions network resources electronically does not discharge its obligation under section 251(c)(3) by offering competing providers access that involves human intervention, such as facsimile-based ordering.[60]

The inadequacies in the testing and operational capabilities of Ameritech Michigan's OSS both for resale and unbundled network elements are well documented in the

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[59] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 516.

[60] Id. at ¶ 523.

record before the MPSC. Critically, the record reflects recent findings by the Wisconsin Public Utilities Commission ("WPSC"), as well as a Hearing Examiner in a proceeding before the Illinois Commerce Commission ("ICC"), that Ameritech's OSS are neither sufficiently tested nor operationally ready.[61] As described by the ICC Hearing Examiner:

> The problem is clear -- it is simply too early for us to determine whether the OSS will operate properly. We are not convinced that the internal testing performed by Ameritech can solve all of the problems that will arise. Without actual testing with other carriers, this checklist item cannot be available. We agree with Staff that we must be provided with empirical evidence that Ameritech's OSS are operational and functional. . . . In order to meet the checklist, Ameritech must ensure the connecting carriers have sufficient information of Ameritech's OSS, including working with carriers that experience rejected orders and/or orders that require manual intervention. . . . Ameritech must also show that carriers are able to utilize Ameritech's OSS in a sufficient manner that will accommodate the demand of a new LEC's service by end users. At this point, we are not convinced that carriers will be able to offer its services to the general public with the expectation that all service orders will be processed.[62]

At the time this conclusion was reached, Ameritech Michigan had already represented to the Commission that its OSS were in a state of operational readiness.[63] The record

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[61] Wisconsin Utility Regulation Report (April 3, 1997) and Hearing Examiner's Proposed Order in Investigation concerning ILLINOIS Bell Telephone Company's compliance with Section 721(c) of the Telecommunications Act of 1996, Case No. 96-0404 (March 6, 1997), attached to AT&T's Submission of Supplemental Information on Ameritech's Operation Support Systems and Other Matters, submitted to the Michigan Public Service Commission in Case No. U-111104 on April 18, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-004961 - 5032).

[62] Hearing Examiner's Proposed Order in Investigation concerning ILLINOIS Bell Telephone Company's compliance with Section 721(c) of the Telecommunications Act of 1996, Case No. 96-0404, at 28 (Ameritech Michigan Application, Vol. 4.1, AM-4-004992).

[63] Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan, filed in CC Docket No 97-1 on January 2, 1997 at 22 - 24 ("The OSS functions have been tested and the results prove that they work as 'advertised'").

before the MPSC confirms that this was not an accurate assessment then, and it is not an accurate assessment now. Myriad problems continue to plague Ameritech Michigan's OSS as it pertains to resale; OSS for unbundled network elements are even further removed from operational readiness. Indeed, most Ameritech Michigan OSS interfaces for unbundled network elements have yet to be used in a commercial environment. Thus, while serious operational problems undermine Ameritech Michigan's resale OSS showing, these deficiencies are only part of the story, the remainder of which will not be known until competitive LECs attempt to use unbundled network element OSS on a broad scale.

As the Commission has acknowledged, "if competing carriers are unable to perform the functions of pre-ordering, ordering, provisioning, maintenance and repair, and billing for network elements and resale services in substantially the same time and manner that an incumbent can for itself, competing carriers will be severely disadvantaged."[64] Hence, the Commission mandated that "incumbent LECs services are to be provisioned for resale with the same timeliness as they are provisioned to that incumbent LEC's subsidiaries, affiliates, or other parties to whom the carrier directly provides the service, such as end users."[65] And, the Commission continued, "[t]his equivalent timeliness requirement also applies to incumbent LEC claims of capacity limitations."[66]

Ameritech Michigan does not meet this clearly-articulated standard. The record before the MPSC reveals that an inordinately large percentage of service orders submitted by

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[64] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 518.

[65] Id. at ¶ 970.

[66] Id.

competitive LECs are not completed in a timely manner, are rejected, and\or are subjected to manual intervention. Thus, for example, Brooks Fiber has shown that barely half of its orders for unbundled loops are completed on time.[67] AT&T Communications of Michigan, Inc. ("AT&T") documents that weekly order rejects have run from 6.4 percent to 63.3 percent.[68] Moreover, AT&T demonstrates that the percentage of orders defaulting to manual processing remains in excess of 25 percent for resale and at 100% for unbundled loops.[69] Indeed, Ameritech recently conceded that manual intervention occurred with respect to roughly 50 percent of service orders received between January 1 and May 1.[70] LCI International ("LCI") has reported persistent delays in the receipt of the usage data necessary to bill customers for local service.[71] And MCI Telecommunications Corporation ("MCI") describes problems involving "double-billing" of competitive LEC customers.[72]

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[67] Brooks Fiber Communications' Submission of Additional Information Regarding Service Order Performance by Ameritech Michigan, submitted to the Michigan Public Service Commission in Case No. U-111104 on May 30, 1997.

[68] Supplemental Direct Testimony of Timothy M. Connolly at 8 - 19, attached to AT&T's Submission of Supplemental Information on Ameritech's Operation Support Systems and Other Matters, submitted to the Michigan Public Service Commission in Case No. U-111104 on April 18, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-006034 - 6045).

[69] Id. at 24 - 27 (Ameritech Michigan Application, Vol. 4.1, AM-4-006050 - 6053).

[70] Summary of Remarks of John Lenahan, Assistant General Counsel, Ameritech before Common Carrier Bureau OSS Forum Ordering/Provisioning, p. 2 (May 29, 1997).

[71] Statement before Federal Communications Commission Open Forum Regarding OSS by Anne K. Bingaman, Senior Corporate Vice President, LCI International, pp. 2 - 5 (May 28, 1997).

[72] Testimony of Ali Miller at 5 - 7, attached to Response of MCI to Ameritech Michigan's Submission of Additional Information Regarding Operations Support Systems, submitted to the Michigan Public Service Commission in Case No. U-111104 on April 25, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-005908 - 10).

Nor does it appear that these problems will be addressed in the near term. LCI reports that it has been unable to engage in a trial of a network platform in conjunction with its upcoming use of unbundled network elements because Ameritech Michigan is currently engaged in such a trial with AT&T and Ameritech Michigan reportedly only has the resources to undertake one such trial at a time.[73] MCI echoes LCI's concerns regarding the lack of commercial testing of much of Ameritech Michigan's OSS functionality and confirms the difficulties encountered in securing trials.[74] AT&T has reported that provisioning delays increase as order volumes rise.[75]

Moreover, as noted above, despite its flaws, OSS for resale is far advanced relative to OSS for unbundled network elements in the Ameritech Michigan markets. And even resale OSS cannot effectively accommodate the more "complex" service orders associated with services other than voice service.[76] In short, Ameritech Michigan OSS are not yet adequate to ensure timely and accurate pre-ordering, ordering, provisioning, maintenance and repair, and billing support.

The competitive impact on new market entrants of inadequate OSS cannot be overstated. Competitive LECs are challenging a local institution that has been the sole source

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[73] Id. at 12 - 13.

[74] Letter to William F. Caton, Acting Secretary, Federal Communications Commission, from Kimberly M. Kirby, Senior Manager, FCC Affairs, MCI Communications Corporation, Attachments, filed June 3, 1997.

[75] Supplemental Direct Testimony of Timothy M. Connolly at 11, attached to AT&T's Submission of Supplemental Information on Ameritech's Operation Support Systems and Other Matters, submitted to the Michigan Public Service Commission in Case No. U-111104 on April 18, 1997 (Ameritech Michigan Application, Vol. 4.1, AM-4-006037).

[76] Id.

of local telephone service for decades. New market entrants will generally have at best a single window of opportunity to persuade lifelong Ameritech Michigan customers to try their service. This window will rapidly close in the event that the subsequent delivery of service is less than optimal. And any service or billing problems will of course be laid at the feet of the competitive LEC, thereby also placing at risk existing customer relationships. TRA's resale carrier members know from long painful experience how quickly customers can be lost as a result of service and billing problems occasioned by an underlying network provider.

Simple incompetence on the part of the underlying network provider is painful enough for the resale carrier that must deal with the customer fallout; problems resulting from wilful misconduct are an order of magnitude worse. Intentional harm is generally more precisely targeted and usually better hidden. TRA has attached as Exhibit I to its Opposition here, materials it recently submitted to the MPSC to illustrate, in admittedly anecdotal form, the adverse impact of such OSS deficiencies, in this instance seemingly intentionally undertaken. In the circumstance described, the problems commenced with the need for manual intervention in the processing of a service order and were exacerbated by anticompetitive conduct on the part of Ameritech Michigan. The net result is a lost customer and a lost opportunity.

One additional matter that bears emphasis here is the need for Ameritech Michigan, and other BOCs and incumbent LECs, to provide viable "electronic bonding" for all competitive LECs, not just one small segment of the universe of new market entrants. Obviously, an electronic interface that is too complex and expensive for all but the largest competitive LECs to avail themselves of will not facilitate market entry by small to mid-sized carriers. Similarly, an electronic interface that is not robust enough to accommodate the high

volume needs of large providers will not foster widespread local competition. For example, the Electronic Data Interchange ("EDI") utilized by Ameritech Michigan for ordering and provisioning is a complex, high volume solution requiring significant investment by new market entrants in facilities and personnel.[77] Use by Ameritech Michigan of a WEB Graphical User Interface ("GUI"), such as that employed by NYNEX, in addition to EDI for these purposes would facilitate interaction with, and hence market entry by, carriers operating on a relatively small scale.

2. Ameritech Michigan is Not Providing Unbundled Local Switching

As Ameritech Michigan acknowledges, it is not providing, and has not provided, unbundled local switching to any competitive LEC.[78] Ameritech Michigan nonetheless contends that it has "fully implemented" the "competitive checklist" because "[o]nce . . . [a] competitor actually places an order for unbundled local switching, Ameritech stands ready to fill it."[79] TRA disagrees.

As discussed above, Congress drew a "bright line" between "providing" and "offering" in establishing two separate and distinct compliance vehicles. While it was willing to accept the mere "offering" of a "competitive checklist" item in the context of the narrow "Track B" exception to the "Track A" rule, Congress emphasized the need for "full implementation" of the "competitive checklist" as the compliance standard. In order to achieve

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[77] Brief in Support of Ameritech Michigan Application at 22 - 25.

[78] Id. at 15 - 16.

[79] Id. at 16.

full "competitive checklist" compliance, Ameritech Michigan must be actually providing each of the fourteen "competitive checklist" items. The texts of Sections 271(c)(1), 271(c)(2) and 271(d)(3), as bolstered by the Conference Committee Reports, simply do not allow for any other interpretation or for that matter, for any exceptions.

This strict reading is particularly critical with respect to unbundled local switching and with regard to Ameritech Michigan. The Commission has recognized that the ready availability of local switching as an unbundled network element is key to prompt market entry and competitive viability. The availability of unbundled local switching permits new market entrants to enter the local market without confronting the extended lag time, as well as the considerable investment, associated with the purchase and installation of multiple switches. As the Commission noted:

> In the United States, there are over 23,000 central office switches, the vast majority of which are operated by incumbent LECs. It is unlikely that consumers would receive the benefits of competition quickly if new entrants were required to replicate even a small percentage of incumbent LECs' existing switches prior to entering the market. The Illinois Commerce Commission staff presented evidence in a recent proceeding indicating that it takes between nine months and two years for a carrier to purchase and install a switch.[80]

Moreover, the availability of unbundled local switching frees competitive LECs to use loop and transport facilities obtained from third parties, such as cable television service providers, competitive access providers or electric utilities, thereby decreasing their reliance upon the incumbent LECs with which they are competing. Accordingly, the Commission found that "denying access to a local switching element would substantially impair the ability of many

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[80] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 411.

competing carriers to provide telecommunications services," creating a "entry barrier."[81] Conversely, the Commission reasoned, "the availability of unbundled local switching is likely to increase the number of carriers that will successfully enter the market, and thus should accelerate the development of local competition."[82]

A strict interpretive stance is also particularly critical with respect to Ameritech Michigan's provision of unbundled local switching given the problems that continue to plague even the carrier's "paper offering." For example, Ameritech Michigan persists in denying competitive LECs the right to use existing switched-based routing algorithms to route traffic over the common transport network that Ameritech Michigan uses to transport its own traffic, thereby denying competitive LECs the ability to share the carrier's interoffice transmission facilities. As a practical matter, Ameritech Michigan effectively allows use by competitive LECs of unbundled local switching only to originate traffic, denying them the right to provide terminating access services. And Ameritech Michigan imposes exorbitant nonrecurring charges on competitive LECs acquiring unbundled local switching and provides for recovery of certain costs in a manner wholly unrelated to the manner in which they were incurred. Finally, the assessment of the ICC Hearing Examiner is pertinent here:

> [I]nternal testing of ULS has just begun . . . Consistent with our standard that with respect to a particular checklist item, all systems must be in place and there must be sufficient testing of the item so

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[81] Id. at ¶¶ 410 - 11.

[82] Id. at ¶ 411.

> that this Commission can have a high level of confidence that said checklist item will function as expected. This is not yet the case with ULS at this time.[83]

The Commission should question why no competitive LEC has availed itself of the opportunity to acquire unbundled local switching from Ameritech Michigan even though the carrier purportedly "stands ready to fill" any such order. The Congress indeed was wise to require full implementation of each "competitive checklist" item as a precondition to grant of "in-region," interLATA authority.

3. Ameritech Michigan is Not Providing "Competitive Checklist" Items at Rates Which Comply with Sections 251 and 252

"Competitive checklist" compliance requires that unbundled network elements and wholesale services be provided at rates and charges that comply with Sections 251(c)(3) & (4) and 252(d)(1) & (3).[84] Rates for unbundled network elements, accordingly, must be based on the cost of providing the elements, while wholesale prices must account for all reasonably avoidable costs. The ultimate determination of whether such rates and charges pass statutory muster for purposes of Section 271(d)(3) rests with the Commission, following consultation with the pertinent State Commission.

As the Commission has acknowledged, "the pricing of interconnection, unbundled elements, resale and transport and termination of telecommunications is important to ensure that

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[83] Hearing Examiner's Proposed Order in Investigation concerning ILLINOIS Bell Telephone Company's compliance with Section 721(c) of the Telecommunications Act of 1996, Case No. 96-0404, at 41 (Ameritech Michigan Application, Vol. 4.1, AM-4-005005).

[84] 47 U.S.C. §§ 251(c)(3) & (4), 252(d)(1) & (3).

opportunities to compete are available to new entrants."[85] Certainly then, rates and charges for unbundled network elements and wholesale prices must be considered by the Commission in assessing a BOC's implementation of the "competitive checklist." Indeed, even Ameritech itself has acknowledged that the rates and charges associated with a BOC's provision of "competitive checklist" items will play a role in the Commission's evaluation of the BOC's application for "in-region," interLATA authority.[86]

Ameritech Michigan is currently providing "competitive checklist" items based on interim rates arrived at through arbitration or negotiation. These rates are of course subject to change based upon completion of requisite cost studies.[87] Given that the form and level of permanent rates cannot be known at this time, the Commission cannot make a reasoned assessment of Ameritech Michigan's "competitive checklist" compliance. Certainly, the Commission cannot determine whether unknown rates and charges are consistent with the pricing standards mandated by the Telecommunications Act.

D. Grant of the Ameritech Michigan Application Would Not be Consistent with the Public Interest, Convenience and Necessity

The final evaluative task assigned to the Commission under Section 272(d)(3) is the determination of whether grant of the "in-region," interLATA authorization sought by

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[85] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 114.

[86] Motion of Ameritech Corporation for Leave to File Response to Motions for Stay and Response of Ameritech Corporation to Motions for Stay filed in The Iowa Utilities Board v. FCC, Case No. 96-3321 (8th Cir. petition for review filed Sept. 5, 1996) at 2.

[87] Consultation of the Michigan Public Service Commission, Section II.C (filed June 9, 1997).

Ameritech Michigan would be "consistent with the public interest, convenience, and necessity.[88] The public interest standard is a necessarily broad test incorporating a host of considerations. A critical element of a public interest analysis involving market entry, of course, is the competitive impact of such entry.[89] TRA submits that the inclusion of a public interest test among the Commission's evaluative requirements reflects a Congressional mandate that the Commission assess the impact of BOC provision of "in-region," interLATA service on both nascent local and existing long distance competition. Certainly, the public interest test is not a license for the Commission to reduce or expand the "competitive checklist;" Section 271(d)(4) makes this clear.[90] Congress clearly intended a more "macro" analysis involving a broad assessment of competitive and consumer impacts.

It is TRA's strongly-held belief that the public interest would not be served by authorizing Ameritech Michigan to originate interLATA service within the State of Michigan until such time as consumers in at least the largest metropolitan areas within the State are able to select among two or more established facilities-based providers of local exchange/exchange access service and interstate switched access charges have been reduced to reflect the economic cost of originating and terminating long distance traffic. By established facilities-based providers, TRA is referring to competitive local exchange carriers that are, and have been for some modicum of time, operational and are providing dial tone and other local services to a significant

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[88] 47 U.S.C. § 271(d)(3)(C).

[89] *See, e.g.,* FCC v. RCA Communications, Inc., 346 U.S. 86, 90 - 91 (1953).

[90] 47 U.S.C. § 271(d)(4). It is noteworthy that a proposed amendment that would have eliminated the public interest test because it was duplicative of the "competitive checklist" was soundly defeated by the Senate. Cong. Rec. 57960 - 7971 (daily ed. June 8, 1995).

number of customers. A critical mass of customers is an essential element because a provider's ability to attract customers is a demonstration of its and its service's operational viability, which in turn confirms the BOC's compliance with the Telecommunications Act's mandate that services and facilities provided to a new market entrant must be at least of equal quality to that the BOC provides to itself. Market share, while not a perfect indicator, is also a useful gauge of the viability of competition in a market.[91]

As monopoly or near monopoly providers of local exchange/exchange access service, the BOCs retain the ability to (i) hinder competitive entry into local markets; (ii) undermine the competitive viability of new entrants into the local market; and (iii) adversely impact existing providers of interLATA service. The BOCs will retain the ability to impede local, and diminish long distance, competition so long as they retain control of local "bottleneck" facilities. This ability to act anticompetitively will diminish only when competitive providers of local exchange/exchange access service who are not dependent upon BOC network services establish a solid competitive foothold, thereby eroding the local "bottleneck." Until a BOC's control of "bottleneck" facilities no longer encompasses the larger part of the population of a State, authorizing the BOC to originate interLATA service within that State would not only not serve, but would be directly contrary to, the public interest. Such a premature action would deny the residents of the State not only the potential benefits of local exchange/exchange access competition, but reduce the existing benefits to those consumers of long distance competition.

The telephony provisions of the 1996 Act are designed, among other things, to open the monopoly local exchange/exchange access markets to competitive entry, eliminating

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[91] *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 571 (1966).

"not only statutory and regulatory impediments to competition, but economic and operational impediments as well."[92] It belabors the obvious, however, to state that an order of magnitude difference exists between theoretically "contestable" and actually "contested" markets. While competitive potential may ultimately evolve into actual competition significant enough to discipline BOC market power, the lag in time before competition actually emerges may, and likely will, be substantial. And this lag in time will be exacerbated by BOC resistance to competitive entry and the competitive provision of local exchange and exchange access service. As succinctly put by the Commission:

> We recognize that the transformation from monopoly to fully competitive markets will not take place overnight. We also realize that the steps taken thus far will not result in the immediate arrival of fully-effective competition. Accordingly, the Commission and state regulators must continue to ensure against any anticompetitive abuse of residual monopoly power, and to protect consumers from the unfettered exercise of that power.[93]

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[92] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 3.

[93] Ameritech Operating Companies: Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, 11 FCC Rcd. 14028, ¶ 130 (released Feb. 15, 1996).

As noted previously, monopolists do not readily relinquish market power. As the Commission has recognized, "b]ecause an incumbent LEC currently serves virtually all subscribers in its local serving area, an incumbent LEC has little economic incentive to assist new entrants in their efforts to secure a greater share of that market."[94] BOCs and other incumbent LECs can erect a variety of economic and operational barriers to competitive entry into, and competitive survival in, the local market. History teaches that the BOCs will actively seek as a profit maximizing strategy to forestall competition by interposing these barriers. TRA submits that BOC market conduct will be adequately disciplined only when local dial tone can be obtained from other facilities-based providers with proven competitive capabilities, and that the only incentive strong enough to motivate the BOCs to permit such facilities-based competitive entry is their desire to provide "in-region," interLATA services.

TRA believes that the experience of its resale carrier members in dealing with AT&T in the long distance market is instructive here. When non-facilities based or "switchless" resale was born in the late 1980s, AT&T possessed a market share in the range of seventy-five percent; MCI's market share was roughly ten percent, with Sprint lagging behind at around six percent.[95] During the following decade, AT&T lost more than a quarter of its market share, while MCI and Sprint increased their market shares by more than fifty percent and WorldCom, Inc. ("WorldCom") seized five percent of the market.[96] During this interim period, the dealings of TRA's resale carrier members with AT&T were marred by persistent and substantial

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[94] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 10.

[95] Long Distance Market Shares (Third Quarter 1996), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 6 (Jan. 15, 1997).

[96] Id.

anticompetitive abuses, while MCI generally declined to provide service to resale carriers.[97] Only Sprint and WilTel, Inc. ("WilTel") aggressively sought the business of resale carriers and structured their operating systems to accommodate resale. It has only been of late that AT&T has begun to view resale carriers as the large, desirable customers the FCC perceived them to be in 1991.[98]

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[97] A survey by TRA of its resale carrier members in 1994 showed that anticompetitive abuses were limited almost exclusively to AT&T. Thus, for example, nearly 80 percent of respondents identifying AT&T as their long distance network provider reported that AT&T had used their confidential and proprietary information to solicit their customers, indicated that such abuses occurred "very frequently," "frequently" or "regularly" and were "very serious" or "serious," and confirmed that they had lost a "large number" or a "medium number" of customers as a result of such abuses. For all the rest of the long distance network providers combined, there were only two reports of "frequent" or "regular" abuse and only three reported instances of "very serious" or "serious" abuses and "large numbers" or "medium numbers" of lost customers. With respect to service provisioning, TRA's survey revealed similar discrepancies among AT&T and the other long distance network providers. Thus, survey respondents reported that, with rare exceptions, most network providers provisioned service orders within fifteen days, with the large majority of orders being processed within ten days. In contrast, the vast majority of respondents who used AT&T reported provisioning intervals for outbound service of between sixteen days and more than one hundred and twenty days, with delays generally in the sixteen to sixty day range. With respect to "800" service, more than two thirds of the AT&T respondents reported delays of twenty-six days or more, ranging upward to one hundred and twenty days. Likewise, the survey revealed that AT&T rejected upwards to six times the number of service orders rejected by other long distance network providers. As a result, a majority of the survey respondents identifying AT&T as their network provider characterized "jamming" as a "very serious" or "serious" problem, while among respondents who identified other carriers as their network providers only a small handful so characterized "jamming." Yet another example of anticompetitive abuse relates to incomplete, inaccurate or untimely call detail reporting. Of the survey respondents identifying AT&T as their network provider, more than two thirds reported that "unbilled toll" remained a problem, while less than twenty percent of all other respondents so indicated. Not surprisingly, the vast majority of survey respondents that utilized AT&T as their network provider described their relationship with AT&T as "poor" or "fair," while the overwhelming majority of respondents who used the networks of Sprint or WilTel rated their relationships with these carriers as "good," "very good" or "excellent," with the greatest number rating their relationships "very good."

[98] Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880, ¶ 115 (1991) ("First Interexchange Competition Order"), 6 FCC Rcd. 7255 (1991), 6 FCC Rcd. 7569 (1991), 7 FCC Rcd. 2677 (1992), *recon.* 8 FCC Rcd. 2659 (1993), 8 FCC Rcd. 3668 (1993), 8 FCC Rcd. 5046 (1993), *recon.* 10 FCC Rcd 4562 (1995) ("[R]esellers, like other users, are valued customers -- in fact, they are large customers. It is not reasonable to assume that AT&T will refuse to present them with viable service options at reasonable rates."). The Commission was correct in one respect, resale

[footnote continued on next page]

As the dominant player in the long distance market, AT&T had the ability and the incentive to act in an anticompetitive manner toward resale carriers. After all, seven out of every ten customers acquired by resale carriers were previously AT&T customers. In sharp contrast, Sprint and WilTel had a strong economic incentive to deal with resale carriers. More than nine out of every ten customers resale carriers placed on the Sprint network had been customers of Sprint's long distance competitors and WilTel had positioned itself in the market as a wholesale provider. As a result, Sprint and WilTel welcomed resale carriers and actively worked to enhance service provisioning, billing and security to benefit resale carriers, while AT&T abused its forced relationship with resale carriers, acting to affirmatively undermine their competitive viability. Only when AT&T's market share approached 50 percent and the other facilities-based providers had achieved a strong market position did AT&T begin to reform its conduct with respect to resale carriers. Other earlier offered incentives, such as price cap regulation or reclassification as a nondominant carrier, had proven to be insufficient to incent such reformation.

History will soon repeat itself in the local market. Like AT&T, the BOCs will seek to thwart competition by anticompetitive abuse of market power; their ability and incentives to do so, however, will be greater than AT&T's both because their market share is substantially larger and their control of essential facilities is far more pervasive. While the Commission has recognized that the "transition from monopoly to competition" will not be an easy one and has

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[footnote continued from preceding page]

carriers are among the largest purchasers of interexchange services in the Nation. For example, the resale carriers listed in the FCC's report of long distance market share provide billions of dollars in revenues annually to long distance network service providers. Long Distance Market Shares (Third Quarter 1996) at Table 6.

promised "swift, sure and effective" enforcement of the rules adopted to open local markets to competition, it has nonetheless acknowledged that in the event that it fails in its enforcement responsibilities, "the actions [taken] . . . to accomplish the 1996 Act's pro-competitive, deregulatory objectives may prove to be ineffective."[99]

TRA submits that only an entity which has operated within a legally protected monopoly environment, confronting competition only at the fringes of its market, would claim with a straight face that the public interest would be well served by sanctioning its entry into a competitive market in which it could use its market power in its monopoly stronghold to disadvantage competitors without first ensuring that that monopoly bastion had been, or at least could be, breached by competitive providers. The market Ameritech Michigan seeks to enter is now served by a half dozen national networks supplemented by dozens of regional networks, and populated by hundreds of providers.[100] More than five years ago, the Commission found this market to be "substantially competitive."[101] And since that time, the market share of AT&T Corp. ("AT&T") has fallen another ten percentage points and the market share of carriers beyond the "big three" has nearly doubled.[102]

Standing in stark contrast is the local exchange/exchange access market. The BOCs still account for "approximately 99.1 percent of the local service revenues in the markets

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[99] Local Competition First Report and Order, CC Docket No. 96-98, FCC 96-325 at ¶ 20.

[100] Motion of AT&T to b Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, ¶¶ 57 - 62 (1995); Fiber Deployment Update: End of Year 1995, Kraushaar, J. M., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 6 - 14 (July 1996).

[101] Competition in the Interstate, Interexchange Marketplace, 6 FCC Rcd. 5880 at ¶ 36.

[102] Long Distance Market Shares (Third Quarter 1996), Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 5 (Jan. 15, 1997).

they serve."[103] Two years ago, the Commission reported that "development of competition in local services is roughly a dozen years behind the development of competition in long distance."[104] Over the past decade, competitive access providers have only "selectively impact[ed] the growth of demand of the local exchange carriers."[105] In short, the local exchange remains "one of the last monopoly bottleneck strongholds in telecommunications."[106]

As the Commission has recognized, introducing competition into the local exchange/exchange access market is key to realization of the Congressional goal of "opening all telecommunications markets to competition."[107] Infusion of competition into this "monopoly bottleneck stronghold" was intended by Congress "to pave the way for enhanced competition in *all* telecommunications markets."[108] As the Commission explained, "[c]ompetition in local exchange and exchange access markets is desirable, not only because of the social and economic benefits competition will bring to consumers of *local* services, but also because competition eventually will eliminate the ability of an incumbent local exchange carrier to use its control of bottleneck local facilities to impede free market competition."[109]

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[103] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 at ¶ 10.

[104] Common Carrier Bureau, Federal Communications Commission, Common Carrier Competition, (Spring, 1995).

[105] Fiber Deployment Update: End of Year 1995 at 34.

[106] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶ 4.

[107] Joint Explanatory Statement at 113.

[108] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶ 4 (emphasis in original).

[109] Id. (emphasis in original).

The sequence, hence, is critical to furtherance of the public interest. First, given that "incumbent LECs have no economic incentive, *independent of the incentives set forth in sections 271 and 274 of the 1996 Act,* to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services,"[110] local exchange/exchange access competition will not emerge, or will not emerge as quickly, if BOC entry into the "in-region," interLATA market is authorized prematurely. Thus, in order to secure for the public the benefits of local competition, grant of "in-region," interLATA authority must follow competitive entry into the local exchange/exchange access market. Only after the benefits to be derived from such competitive entry have been secured should the focus shift to "promoting greater competition in the long distance market."[111] As the Commission has explained, local exchange/exchange access competition will "pave the way for enhanced competition in all telecommunications markets."[112] As set forth by the Commission, the proper sequence is:

> Under section 251, incumbent local exchange carriers . . ., including the Bell Operating Companies . . ., are mandated to take several steps to open their networks to competition . . . Under Section 271, *once the BOCs have taken the necessary steps,* they are allowed to offer long distance service in areas where they provide local telephone service.[113]

Moreover, just as the Commission has recognized that the public will benefit from local exchange/exchange access competition, so too has it acknowledged that the BOCs retain the incentive and the ability to utilize their "bottlenecks" control of essential facilities to

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[110] Id. at ¶ 55 (emphasis added).

[111] Id. (emphasis in original).

[112] Id. (emphasis in original).

[113] Id. (emphasis in original).

disadvantage IXC rivals.[114] While the Congress and the Commission have endeavored to establish various structural and accounting safeguards to curb BOC abuse of market power, only the market forces unleased by competitive entry into the local exchange/exchange access market will adequately discipline BOC market behavior.[115] Thus, the secondary goal of "promoting greater competition in the long distance market" will only be achieved if the proper sequence is followed.

The existence of widespread local exchange/exchange access competition addresses several concerns critical to a public interest analysis. First, it provides demonstrable evidence that local markets have indeed been opened to competitive entry. Given the number and diversity of the economic and operational barriers to entry that the Commission has acknowledged exist,[116] the only viable way to confirm that local markets have actually been opened is to ascertain that new market entrants have established competitive footholds. As the Commission has recognized, such difficult to detect stratagems as BOC failure to provide such basic functions as ordering, provisioning, maintenance and repair on a nondiscriminatory basis can severely disadvantage competitors.[117]

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[114] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 at ¶¶ 10 - 13.

[115] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 at ¶¶ 1 *et. seq.*; Implementation of the Telecommunications Act of 1996: Accounting Safeguards Under the Telecommunications Act of 1996 (Report and Order), CC Docket No. 96-150, FCC 96-490, 11 FCC Rcd. 17539 (Dec. 24, 1996); 47 U.S.C. § 272.

[116] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 at ¶¶ 10 - 20.

[117] Id. at ¶ 518.